NORAINI MAT ZAINOL

v.

PP

HIGH COURT MALAYA, ALOR STAR
MOHD ZAKI ABDUL WAHAB JC
[CRIMINAL APPEAL NO: 41S(A)-04-2009]
30 OCTOBER 2011

CRIMINAL PROCEDURE: *Kidnapping - Criminal Procedure Code, s. 363 - Conviction and sentence - Appeal against - Defence of unsound mind - Penal Code, s. 84 - Whether Magistrate could reject opinion of expert where there is no rebuttal evidence - Mental capacity of appellant - Whether appellant incapable of knowing nature of act was wrong or contrary to law - Criminal Procedure Code, ss. 347 & 348*

The appellant was tried before a Magistrate Court for an offence of kidnapping an infant while working as a nurse at a hospital, under s. 363 Penal Code. The appellant was found guilty and convicted for the offence, upon which she was sentenced to 36 months' imprisonment. On the facts of the case, the magistrate ruled the prosecution had proved a *prima facie* case against the appellant. The appellant had put up a defence of unsound mind under s. 84 of the Penal Code. DW2, a Forensic Psychiatrist Consultant, was the witness called to support the defence. After examining the appellant, DW2 concluded that the appellant was suffering a mental illness known as "depression with psychotic feature" and as a result, the appellant was unaware of her actions at the time the offence was committed. The prosecution, however, had made no effort to get it rebutted or confirmed. At the end of the trial, the magistrate rejected the opinion of DW2. The issue that arose was whether the magistrate could reject an opinion of an expert where there is no rebuttal evidence to the evidence.

Held (allowing the appeal):

(1) The state of mental capacity of the appellant at the time of the offence is a fact needed to be decided by the court as the defence of unsoundness of mind was raised. It is not easy to determine the mental capacity of a person. Under such circumstances, the magistrate must be assisted with an expert opinion to arrive at the decision. (para 23)

(2) DW2 had clearly considered the facts and the surrounding issues *ie*, that the appellant was so obsessed with being pregnant and having a baby, before coming to the conclusion on the appellant's mental capacity. As such, there was no other evidence to rebut the finding of DW2 and under the circumstances, the court should have accepted DW2's evidence. (para 27)

(3) Upon accepting DW2's evidence, the magistrate must, on the overall evidence, make a finding that the defence had succeeded in proving the defence of unsound mind on the balance of probabilities. In this case, there was overwhelming evidence to prove that the appellant did the act of kidnapping a baby, but by virtue of her mental capacity she was incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law. The magistrate should have made such finding as required under s. 347 Criminal Procedure Code. Accordingly, the magistrate should proceed to make an order under s. 348 of the Criminal Procedure Code. The appellant shall thus be detained at the Hospital Bahagia, Tanjung Rambutan, Perak. (para 29)

Case(s) referred to:
Kofri Mustafar v. PP [2010] 9 CLJ 519 CA
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC
PP v. Saimin & Ors [1971] 1 LNS 115 HC
Juraimi Husin v. PP [1998] 2 CLJ 383 CA
PP v. Muhamad Suhaimi Aziz [2002] 2 CLJ 209
Wong Swee Chin v. PP [1980] 1 LNS 138 FC
Syed Abu Bakar Ahmad v. PP [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368 FC
Samundee Devan Kerishnan Muthu v. PP [2009] 1 CLJ 498 CA
John Nyumbei v. PP [2007] 2 CLJ 509 CA

Legislation referred to:
Criminal Procedure Code, ss 342, 347, 348
Panel Code, ss. 84, 363

For the appellant - M Chandran; M/s Thiru, Chandran, & Partners
For the respondent - Dato' Razali Che Ani; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Zaki Abdul Wahab JC:

Background

[1] The appellant was tried before a Magistrate Court at Sungai Petani for an offence of kidnapping an infant while working as a nurse at Sultan Abdul Halim Hospital in Sungai Petani, an offence under s. 363 Penal Code. On 7 September 2010, she was found guilty and convicted for the offence, upon which she was sentenced to 36 months imprisonment.

[2] Briefly the facts of the case are as follows. In June 2005 the appellant was working as Community Nurse (Jururawat Masyarakat) attached to Hospital Sungai Petani. On 19 June 2005 an infant was found missing from the Hospital Sungai Petani and accordingly a police report were lodged. As the result of the police investigation the infant were recovered from the appellant's house.

[3] The appellant was later arrested and charged for the offence under s. 363 Penal Code. Her husband was charged of abetting her in committing the offence. They were jointly tried before the Magistrate.

Decision Of The Magistrate

[4] On the fact of the case, the learned magistrate ruled that the prosecution had proved a *prima facie* case against the appellant. Accordingly he ordered the appellant to enter her defence.

[5] The appellant put up a defence of unsound mind under s. 84 of the Penal Code, although the defence was referred to by all parties as a defence of insanity. Section 84 Penal Code refers such a defence as unsoundness of mind and never refered it as insanity. The appellant however elected to remain silent but called a witness, to support her defence of insanity or unsound mind.

[6] Dr. Hajjah Rabaiah bt Mohd Salleh (DW2), a Forensic Psychiatrist Consultant, attached to Hospital Bahagia Ulu Kinta was the witness called to support the defence. The appellant was admitted to Hospital Bahagia from 22 August 2005 and remained there until 2 September 2005. DW2 examined and had a conversation with the appellant upon the admission and thereafter

A the appellant was put under observation. DW2 also assessed the mental capacity of the appellant during which the appellant had been confined in Hospital Bahagia. DW2 concluded that the appellant was suffering from mental illness known as major depression with psychotic feature. As the result of this mental
B illness DW2 gave opinion that the appellant was insane and could not be aware of her action at the time of the offence committed.

[7] DW2 was cross-examined by the Deputy Public Prosecutor who appeared for the prosecution. She admitted she never met
C the appellant before the incident as alleged in the charge. The appellant was alleged to commit the offence on 19 June 2005. It was also suggested to her that she would not know the appellant's mental condition on 19 June 2005. She disagreed with the suggestion based on her interview with the appellant and her
D family members and also from the record obtained from the staff assigned to look after the appellant while she was under observation at the Hospital Bahagia.

[8] The prosecution did not call any witness to rebut DW2's evidence. The appellant was referred to Hospital Bahagia by a
E psychiatrist from a private hospital. There was neither application nor order sought to by any party from the court to refer the appellant to any mental hospital. A court may give such an order if sought to under s. 342 Criminal Procedure Code.

F **[9]** In the course of his submission at the end of the case, the learned counsel for the appellant submitted that he had informed the court and the learned DPP Zaki about the defence of insanity and also supplied a copy of psychiatrist report to the learned DPP before the trial started. However this was not shown in the
G record of proceeding. From the record it can be seen that DPP Zaki had conducted prosecution of this case for quite sometime before the prosecution was taken over by another DPP.

[10] The learned DPP who appearing for the prosecution, in his
H submission, did not say anything on the supply of information on the defence of unsoundness of mind to the prosecution before the trial started. Despite that situation, the learned DDP questioned the action of the defence in raising the defence of unsound mind only at the defence stage and not before that. On the record, one
I DPP Syazwani and one DPP Lim appeared for the prosecution on the last day of trial. They took over the case from DPP Zaki.

[11] It is true the defence of unsound mind was never raised during the prosecution case by way of cross-examination of the prosecution witnesses. In *Kofri Mustafar v. PP* [2010] 9 CLJ 519, the court of appeal held that the defence of unsound mind should have been raised even during the prosecution case, otherwise there will be an allegation of afterthought; if it is only raised during the defence stage. However, in this case; if the word of the learned defence counsel is accepted that earlier notice of the defence had been given to the DPP, though to the DPP who had appeared earlier and did not handle the case at the later stage, it would have appeared that the prosecution should have had the notice of the defence. As a copy of the psychiatrist report had been supplied to the prosecution at that stage, the prosecution could have obtained another report to counter DW2' opinion or could have obtained the order from the court under s. 342 of CPC to send the appellant for observation. This had not been done. It is my view that the defence of unsound mind raised in this case is not an afterthought defence as earlier notice were given though not raised during the prosecution case.

[12] At the end of the trial the magistrate rejected the opinion of DW2. In his judgement the learned magistrate wrote:

> Setelah meneliti semula semua keterangan saksi-saksi pendakwaan dan juga keterangan pembelaan, mahkamah mendapati pihak pembelaan telah gagal menimbulkan keraguan melangkaui munasabah. Pembelaan insanity yang cuba ditimbulkan oleh peguambela juga gagal menimbulkan keraguan terhadap keterangan yang dikemukakan oleh saksi-saksi pendakwaan. Tambahan OKT1 memilih untuk berdiam diri ... mahkamah berpendapat OKT1 sedar dengan perbuatan yang dilakukan dan tindakan beliau sambil dibantu OKT2 yang turut bersubahat dalam cuba mendaftarkan bayi yang dicolek dari hospital juga jelas menunjukkan OKT1 sebenarnya sedar akan apa yang dilakukan. Dari tindakan OKT1 sehinggalah penemuan semula bayi tersebut tidak menggambarkan bahawa OKT1 tidak waras semasa kejadian walaupun dikatakan sebaliknya oleh SD2 berdasarkan pemerhatian beliau dua bulan selepas OKT1 dirujuk kepada beliau.

[13] The above passage of judgement had shown two things, namely; the standard of prove imposed on the defence at the defence stage and reason for rejecting the expert opinion. In an ordinary trial it is clear the learned magistrate had imposed heavy standard of proof on the defence. It is trite law the defence only

A has the duty to cast a reasonable doubt on the *prima facie* case and is never required to raise "doubt beyond reasonable" as held by the learned magistrate (see *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311). What is meant by reasonable doubt was clearly decided in *PP v. Saimin & Ors* B [1971] 1 LNS 115.

[14] In this case however, the defence had raised the defence of unsoundness of mind. Under s. 105 Evidence Act 1950 the defence has the burden to prove the defence as this defence is C provided under s. 84 of the Penal Code. This was also decided in *Juraimi Husin v. PP* [1998] 2 CLJ 383.

[15] As to the standard of prove of the defence, the appellant only needs to prove on the balance of probability. This was clearly stated in *Kofri Mustafar v. PP (supra)*. Suriyadi JCA (as he then D was) in that case held:

> Under s. 105 of the Evidence Act, the legal burden is on the appellant to establish the fact that he committed the act in a moment of unsound mind (*Jayasena v. R* [1970] 1 All ER 219). E In an English case, *Woolmington v. Deputy Public Prosecutor* [1935] AC 462) the court reiterated that for a defence of insanity, the legal burden of proof on the balance of probability, is placed on an accused person.

[16] It is clear the law never imposed the burden of proof "doubt F beyond reasonable" as decided by the learned magistrate. In fact such words used by the learned magistrate is not legally recognised. To reiterate I need to say that in an ordinary case, the defence needs only to cast reasonable doubt to the *prima facie* case proven by the prosecution and if the accused raise a defence G of "General Exception" provided under Chapter IV Penal Code, the burden of proof is on the balance of probabilities.

[17] In this case the only evidence for the defence of unsoundness of mind was the testimony of DW2. Her report D29 H was also tendered to corroborate her oral testimony. The prosecution had not produced any evidence in rebuttal of DW2's evidence. As had been pointed earlier, the prosecution had been notified about the defence before the trial started but no effort was done to get it rebutted or confirmed. It is easily done if the I prosecution applied to the court to send the appellant to be

examined by any psychiatrist at any mental hospital. The appellant in this case was referred to Hospital Bahagia Ulu Kinta by a psychiatrist from a private hospital without the order of a court.

[18] As held by the Court of Appeal in *Kofri Mustafar v. PP (supra)*, an expert opinion and a report is required in discharging the burden of proof for the defence of unsoundness of mind. This had been complied with by the defence. In the absence of evidence produced by the prosecution to rebut DW2's evidence, the court had to consider the evidence by DW2 only to determine whether the defence was successfully proven. In this case, the opinion expressed by DW2 was rejected by the learned magistrate, giving the reason that DW2 did not examine the appellant at the time she was alleged to commit the offence.

[19] The question arose whether the magistrate could reject an opinion of an expert where there is no rebuttal evidence to the evidence. There is no doubt of the expertise of DW2. The unchallenged evidence that she had the qualifications and experiences in the field and had testified in so many cases and her evidence had been accepted by many courts. Her evidence was also sought after in the case of *PP v. Muhammad Suhaimi Aziz* [2002] 2 CLJ 209. In that case, Augustine Paul J (as he then was) accepted her evidence and pronounced the accused was of unsound mind at the time of commission an offence of murder.

[20] In the course of the appeal I invited the learned DPP and the learned defence counsel to specifically submit to me on the point of rejection by the learned magistrate of DW2 evidence. The learned defence counsel and the learned Deputy Public Prosecutor for the respondent submitted to me few cases on this point.

[21] To say whether the accused was of sound mind or of unsound mind at the time of offence is basically a finding of a fact on the mental capacity of the accused. It is the court's duty to make a finding of fact. The court cannot shift this duty to other people. However in certain area such as fact involving scientific finding, the court needed assistance of an expert in making finding of the fact. In *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212 the matter of expert evidence was an issue and the Federal Court held:

> Our system of jurisprudence does not generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion. at 214

[22] In *Syed Abu Bakar Ahmad v. PP* [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368, Abdul Hamid Omar FJ (as he then was, delivering the judgement of the Federal Court held:

> It is settled principle that while it is true that a judge who sits alone is entitled to weigh all the evidence, to put his own magnifying glass to determine the probabilities so to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid of expert evidence. at 373

[23] In this case the state of mental capacity of the appellant at the time of the offence is a fact needed to be decided by the court as the defence of unsoundness of mind was raised. It is not easy to determine the mental capacity of a person. To arrive at that opinion, one must have special knowledge and experience in dealing with people behaviour. Ordinary man may not be able to form such an opinion merely by seeing a person. A magistrate in ordinary sense is not an expert in that field but had the duty to make a finding of fact. Under such circumstances the magistrate must be assisted with an expert opinion to arrive at the decision. No doubt in this case the learned magistrate was assisted by DW2 evidence. But that evidence clearly supported the defence and there was no other evidence to contradict or to discredit her evidence except cross-examination by the prosecution. In *PP v. Muhammad Suhaimi Abdul Aziz (supra)*, the expert witness was subjected to cross-examination by the prosecution and even by the judge. There was no other evidence offered by the prosecution to counter the expert opinion. Augustine Paul J (as he then was) in touching that evidence said:

> It is settled law that the question of whether a defence of insanity has been made out or not is a matter for the court to decide. It will be observed that the medical evidence on the mental state of the accused at the time of the incident was not seriously challenged. Neither was any evidence in rebuttal led by the prosecution to challenge the evidence of DW2. In the circumstances the defence advanced is not one that can be rejected with ease. at 220

[24] The learned judge further said:

> There is authority for the proposition that where the medical evidence is unchallenged and there is no evidence to the contrary a verdict of murder cannot stand. In this regard I refer to *R v. Matheson* [1958] 1 WLR 474 where Lord Goddard CJ said at p. 478:
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> > If there are facts which would entitle a jury to reject or differ from the opinion of the medical men, this court would not, and indeed could not disturb their verdict, but if the doctor's evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be 'a true verdict in accordance with the evidence.
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> In the absence of any medical evidence being led by the prosecution to challenge the testimony of DW2 it is my duty to ascertain whether the other evidence on record is sufficient to render the medical evidence led by the defence untenable. at 221

[25] On appeal to the Court of Appeal, the decision was upheld (see *PP v. Muhammad Suhaimi Aziz* [2004] 1 CLJ 378).

[26] In *Samundee Devan Kerishnan Muthu v. PP* [2009] 1 CLJ 498, the Court of Appeal remarked on the expert evidence as follows:

> [19] The value of expert opinions can never be doubted. Expert opinions have a high probative value. Two reasons may be advanced for this. Firstly, an expert witness has the necessary experience in arriving at and justifying his opinion in his specialist field. Secondly, expert opinions can readily be tested against the known facts and the opinion of another expert called by the opposing party in the case. Here, the accused did not call another expert to challenge the evidence of the government chemist. As to the duty of an expert witness, I need only to refer to the case of *Davie v. Magistrates of Edinburgh* [1953] SC 34 at 40. There the court had this to say:

A Their duty to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.

B [20] Experts are called in the majority of cases primarily in order to express their opinion as to the matters in issue in the case. Here, the government chemist was called to analyse whether the subject matter of both the original charges are heroin and monoacetylmorphines, a dangerous drug under the Act. The court C needs the benefit of expertise to arrive at a just decision. Lord Mansfield said in *Folkes, Bart v. Chadd And Others* [1782] 3 Douglas, King's Bench, para. 157, p. 589 that the opinion of scientific men upon proven facts may be given by men of science within their own science. I venture to say that an expert's opinion is admissible to furnish the court with scientific information which D is likely to be outside the experience and knowledge of the judge. per Abdul Malik Ishak JCA at p. 511

[27] Having considered the submission and the circumstances in this case I come to the conclusion that the magistrate should have E accepted DW2 opinion. In his judgement the learned magistrate said the behaviour of the appellant indicated she was of sound of mind at the time of the offence. Perusing the record of appeal I found no doubt the appellant did some acts after the commission of the offence but she was assisted by her husband and the F parent in doing the acts. The appeal record also shows she was so obsessed with the belief of getting pregnant and having a baby. DW2 had clearly considered these facts and other surrounding issues before coming to the conclusion on the appellant's mental capacity. As such there was no other evidence to rebut the G finding of DW2 and under the circumstances the court should have accepted DW2 evidence.

[28] Ultimately the court must consider whether the appellant had discharged the burden of proof for the defence of unsound mind. In *John Nyumbei v. PP* [2007] 2 CLJ 509 the Court of H Appeal it was held:

[16] When the defence of insanity is raised the court thus needs to consider two matters, namely:

I (i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and

(ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie that the accused was incapable of knowing the nature of his act as being wrong or against the law (see *Ratanlal and Dhirajlal's Law of Crimes* (5th Ed) p 289 *et seq*). per Abdull Hamid Embong JCA (as he then was). at 517

[29] Upon accepting DW2 evidence, the learned magistrate must, on the overall evidence recorded before him, make a finding that the defence had succeeded in proving the defence of unsound mind on the balance of probabilities.

[30] In this case there was overwhelming evidence to prove that the appellant did the act of kidnapping a baby, but by virtue of her mental capacity she is incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law. The learned magistrate should have made such finding as required under s. 347 Criminal Procedure Code. Section 347 provides:

Section 347. Judgment of acquittal on ground of mental disorder.

Whenever any person is acquitted upon the ground that at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

[31] Accordingly the learned magistrate shall proceed to make an order under s. 348 Criminal Procedure Code. Section 348 Criminal Procedure provides:

Section 348. Safe custody of person acquitted.

(1) Whenever the finding states that the accused person committed the act alleged, the court before which the trial has been held shall, if that act would, but for incapacity found, have constituted an offence, order that person to be kept in safe custody in such place and manner as the court thinks fit and shall report the case for the orders of the ruler of the state in which the trial is held:

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> Provided that if the court concerned is a Magistrate's Court, the magistrate may in his discretion, if he considers that the offence charged is not of a serious nature and that that person can safely be released without danger of his doing injury to himself or any other person, caution and discharge him.

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> (2) The ruler may order that person to be confined in a mental hospital during the pleasure of the ruler of the state.

[32] This section provides discretion to a magistrate to caution and discharge the appellant if the magistrate considers that the C offence charge is not serious in nature and that the appellant will not do injury to herself or any other person. However in this case although there is no danger of the appellant doing injury to herself and to any other person if she be cautioned and discharge, the offence she was charge with was serious in nature indicated by D maximum penalty of seven years imprisonment. Therefore, it is my view that that provision cannot be used to discharge and caution the appellant.

[33] Accordingly, the appeal is allowed. The conviction and E sentence pronounced by the learned magistrate is replaced with the following order:

> Perayu telah melakukan perbuatan menculik tetapi disebabkan keadaan fikiran beliau yang tidak waras pada masa kejadian beliau tidak berupaya mengetahui perbuatan tersebut menjadi satu F kesalahan. Oleh yang demikian perayu hendaklah ditahan di Hospital Bahagia Tanjung Rambutan, Perak.
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> (The appellant did the act of kidnapping but for the reason of unsound mind at the time of incident she is incapable of knowing the nature of her act as an offence. Therefore the appellant shall G be detained at the Hospital Bahagia, Tanjung Rambutan, Perak).

[34] Having made that order, it is necessary for me to further report the matter to His Royal Highness the Sultan of Kedah for His Royal Highness to make further order and I shall do so.

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